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# Comparative *Judging* of Civil Rights: A Transnational Critical Race Theory Approach

Tanya Katerí Hernández\*

Studies consistently demonstrate that the act of judging is influenced by judges' personal perspectives and experiences. For instance, research has demonstrated that empirically U.S. Supreme Court justices' behavior is motivated, in large part, by their individual attitudes or judicial philosophies.<sup>1</sup> In addition, research on the U.S. chief justice's distribution of opinion assignments also suggests that ideology plays a role inasmuch as those justices whose preferences are more closely aligned with the chief justice will be assigned to author opinions.<sup>2</sup> Furthermore, empirical research indicates that the influence of ideology on judges also extends to federal appellate court judges in race relations cases.<sup>3</sup> Transnational comparative research also suggests that the politicized conduct of judges is not exclusive to the United States.<sup>4</sup> For instance, in a recent comparison of the judicial task of making opinion assignments within the United States, Canada (post-Charter years) and South Africa (apartheid era), the study found that chief justices in all the countries did not assign judges to panels randomly, but rather were influenced by the ideology of the sitting judge and the issues presented in the case.<sup>5</sup> The study concluded that judging is a political behavior that exhibits similar influence to ideology, despite the vastly different

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1. See David W. Rohde & Harold J. Spaeth, *Supreme Court Decision Making* (1976); Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (1993); Harold J. Spaeth & Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (1999).

2. See S. Sidney Ulmer, *The Use of Power in the Supreme Court: The Opinion Assignments of Earl Warren, 1953–1960*, 19 J. of Pub. L. 49 (1970). See also Segal & Spaeth, *supra* note 1.

3. Burton M. Atkins & William Zavonia, *Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit*, 18 Am. J. of Pol. Sci. 701 (1974).

4. See Lee Epstein, *The Comparative Advantage* 9, 1 Law and the Courts: Newsletter of the Law and Courts Section of the American Political Science Association 3 (1999).

5. Lori Hausegger & Stacia Haynie, *Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division*, 37 Law & Soc. Rev. 635 (2003).

structural legal systems for judging that can exist.<sup>6</sup> Is it then possible that John Valery White's "activist insecurity" theory discussed in this volume is applicable beyond the United States context from which he develops the theory?<sup>7</sup>

John White's activist insecurity theory posits that from the inception of civil rights legislation, judges in the United States have demonstrated an unease with affecting social change, based on the mostly unstated notion with no legal basis that courts should not change the social status quo absent extraordinary reasons for doing so. In the search to adhere to a vision of judicial behavior that is formalistic and is not activist, even when the law itself prescribes such change, judges in the United States have felt constrained by a cultural norm White terms "the activist insecurity." The irony, of course, is that the activist insecurity leads judges to avoid the full implications of enforcing civil rights statutes in a way that demonstrates what White calls a "troubling lack of allegiance" to formalistic applications of the law. The activist insecurity theory highlights the way in which the image the judiciary has of itself as an institution limits what it is actually empowered to do. According to White, this in turn has led to the demise of civil rights in the United States because it is not viewed as "real law." Because White's in-depth excavation of all the civil rights cases that demonstrate the activist insecurity is such a massive undertaking, what is left for another day is the question of why civil rights law codified by statute and well established by precedent does not seem like *real law* to jurists.

Accordingly, this essay builds upon John White's conceptualization of activist insecurity, by deploying the analytical tools of Critical Race Theory. Specifically, this essay will first use a Critical Race Theory analysis to explain how unconscious racism is broadly involved in the manifestation of activist insecurity. The essay will then illustrate how the Critical Race Theory understanding of activist insecurity as emanating from unconscious racism thereby implicates not only the enforcement of U. S. civil rights laws, but also the civil rights enforcement of countries internationally. By way of example, the essay demonstrates how the activist insecurity concept is relevant in Latin America. The essay then concludes by proposing a Critical Race Praxis-inspired remedy of Critical Race Theory-infused judicial training to address the manifestation of activist insecurity transnationally.

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6. *Id.* at 654.

7. John Valery White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 La. L. Rev. 783 (2003).

# I. A CRITICAL RACE THEORY ANALYSIS OF THE SOURCE OF ACTIVIST INSECURITY

Critical Race Theory has much to offer in understanding the judicial activist insecurity that permeates not only conservative judges but liberal judges as well. Critical Race Theory is a strain of legal scholarship that challenges the ways in which race and racial power are constructed and represented in legal culture and, more generally, in society as a whole.<sup>8</sup> Critical Race Theory scholar Girardeau Spann has long noted that because jurists have been socialized by the dominant culture,

they have internalized the basic values and assumptions of that culture, including the beliefs and predispositions that can cause the majority to discount minority interests. . . . Moreover, to the extent that the justice has been socialized to share majoritarian prejudices, he or she may not even be consciously aware of the nature of those prejudices, or the degree to which they influence the exercise of the justices's discretion.<sup>9</sup>

What Critical Race Theory has contributed to our knowledge about race relations is the power of demonized racial categories to taint whatever they are associated with. Thus, while many judges may harbor no purposeful disregard for fully enforcing civil rights, as members of society they are just as susceptible to internalizing the cultural disdain for anything that comes to be identified with the needs of subjugated communities.<sup>10</sup> And as legal scholar Charles Lawrence has long observed, the cultural disdain is often unconscious<sup>11</sup> and thus easily pervades perspectives about enterprises most closely associated with the needs of people of color. For instance, scholars who have studied the demise of the War on Poverty and New Society programs of the 1960's note the manner in which its links to Black civil rights led to the decline in public support for the programs.<sup>12</sup> Similarly, when

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8. Critical Race Theory: The Key Writings That Formed the Movement (Kimberlé Crenshaw et al. eds., 1995). See also Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 2-9 (2001).

9. Girardeau A. Spann, *Pure Politics*, 88 Mich. L. Rev. 1971 (1990).

10. See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 380 (1987) ("Judges are not immune from our culture's racism, nor can they escape the psychological mechanisms that render us all to some extent, unaware of our racist beliefs . . . . Judges continue to come primarily from elite white backgrounds. They undoubtedly share the values and perceptions of that subculture, which may well be insensitive or even antagonistic toward the values, needs, and experiences of blacks and other minorities.").

11. *Id.* at 332.

12. See Jill Quadagno, *The Color of Welfare: How Racism Undermined the War on Poverty* 28-31 (1994) (discussing the demise of the War on Poverty

real estate markets come to be associated as being predominantly of color, they are viewed as less desirable;<sup>13</sup> and when particular jobs and sectors of the labor market come to be associated with people of color, they are viewed as less prestigious.<sup>14</sup> Therefore, as Derrick Bell states, in a context in which the law "has always been a powerful expression of ruling interests,"<sup>15</sup> it would be logical that laws not associated with the ruling interests would be viewed as not "real law." Indeed, implicit in the neo-conservative critique of civil rights activists' "misinterpretation" of civil rights laws is the notion that the ability to change the racial status quo is not a role for real law to begin with.<sup>16</sup> In short, activist insecurity may stem not only from what John White describes as a self-imposed vision of judicial behavior that is purely formalistic, but also from the societal disdain that accompanies anything that comes to be closely associated with the needs of people of color.

Consequently, activist insecurity may not exclusively be an outgrowth of the U.S. legal culture, but may instead be more generally manifested wherever longstanding racial discrimination and social exclusion has existed. What then does this portend for those societies outside of the United States that are just beginning to seek mechanisms for bolstering the enforcement of more efficacious civil rights laws?

## II. THE ACTIVIST INSECURITY ABROAD: THE LATIN AMERICAN CASE STUDY

In response to evolving civil rights movements in Latin America, governmental leaders have recently expressed interest in devising

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because of its links to black civil rights programs that used federal funds to: empower community action groups run by local black activists; provide affirmative action and job training programs to break long-standing racial barriers to union jobs; and to provide housing subsidies to those otherwise locked into substandard housing).

13. Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 Stan. L. Rev. 245, 251-54 (1974) (discussing the concept of the racial "tipping point" at which white families have been documented to flee a neighborhood because its growing numbers of black residents will mark it as a "Black neighborhood"). See also Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. Miami L. Rev. 1051 (1998).

14. Donald Tomaskovic-Devey, *Gender and Racial Inequality at Work: The Sources and Consequences of Job Segregation* (1993).

15. Derrick A. Bell, *Faces at the Bottom of the Well: the Permanence of Racism* 94 (1992).

16. Compare Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1339-41 (1988) (analyzing neo-conservative scholar Thomas Sowell's critique of civil rights activists who expansively view the law as a vehicle for obtaining equal results rather than simply equal treatment, and observing his inability to identify "what the real law is").

legal methods for combating racial discrimination.<sup>17</sup> In fact, the Organization of American States adopted a resolution at its General Assembly held in Santiago, Chile, in June of 2003, which directs the Inter-American Commission for Human Rights to report on the ways in which various Latin American countries that are state members have enacted legal measures to combat discrimination in compliance with the 1965 United Nations International Convention on the Elimination of all Forms of Racial Discrimination. Furthermore, in June 2002 the Inter-American Development Bank held a two-day conference in which they brought community activists from throughout Latin America to meet with U.S. scholars from many disciplines to discuss the issue of racial justice. It is the Bank's concern that the loans they extend to many Latin American countries are not fully effective at improving the lives of those countries' citizens, due in large part from the socio-economic barriers of anti-Black racism and bias against indigenous populations. But what hope do these nascent efforts in Latin America have if activist insecurity is a concept that is endemic to civil rights judicial enforcement favoring subordinated communities?

It is not all precipitous to consider the possible effects of an activist insecurity in the context of Latin American civil rights judicial enforcement, considering the fact that judicial reform has long been an issue of concern in Latin America. In particular, the 1980's began an intensive period of judicial reform funding from the United States as part of its overall foreign policy effort to promote democracy abroad.<sup>18</sup>

Funding was provided, in part, to increase judicial personnel training, increase judicial sector budgets and to ameliorate judicial career standards.<sup>19</sup> The judicial reform priorities were set in response to country assessments which indicated that judges in the hemisphere were routinely denied basic resources like training, staff, basic legal materials, updated codes, sound court buildings, and decent salaries.<sup>20</sup> Furthermore, the assessments stated that judges were often subject to political influence, conflicts of interest, and outright corruption.<sup>21</sup>

Since that time, the judiciary in Latin America is still perceived by all of its users to be in a state of crisis,<sup>22</sup> and the countries of the

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17. The countries where notable civil rights movements have emerged are Bolivia, Brazil, Chile, Colombia, Ecuador, and more recently in Mexico. See Alison Brysk, *From Tribal Village to Global Village* 72 (2000); *Black Brazil: Culture, Identity, and Social Mobilization* 15-51 (Larry Crook & Randal Johnson eds., 1999).

18. José E. Alvarez, *Promoting the "Rule of Law" in Latin America: Problems and Prospects*, 25 Geo. Wash. J. Int'l L. & Econ. 281, 281 (1991).

19. *Id.* at 289-90.

20. *Id.* at 294.

21. *Id.* at 294-95.

22. Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean:*

region consider justice reform to be a priority.<sup>23</sup> Opinion polls routinely demonstrate that citizens have little expectation of fair treatment by the Latin American judicial systems and that these institutions are the least respected in the public or private sectors.<sup>24</sup> Specifically, judges are often thought to make erroneous decisions because they do not understand the substantive facts of a case.<sup>25</sup> Corruption continues to run rampant because funding for the judiciary is contingent upon the political will.<sup>26</sup> Furthermore, while the general public perceives the judicial appointment process to be political, secretive, and thus without public accountability,<sup>27</sup> low-income citizens have a particularly low level of confidence in the judicial system.<sup>28</sup> Yet, judicial reform efforts continue. For example, in Brazil, the 1988 Constitution mandated external monitoring of court services.<sup>29</sup> Since 1988, some Brazilian states require career training to enter the judiciary in addition to the competitive test already nationally required.<sup>30</sup> In order to prevent excessive secrecy in the appointments process, Brazil requires that twenty percent of any given court's membership be drawn from the Brazilian Bar Association and from the public prosecutor's office.<sup>31</sup>

As a result of the public focus on judicial corruption in Latin America it is quite probable that its judges may be just as constrained by activist insecurity as judges in the United States. The image of being an activist jurist may be interpreted through the history of politically corrupt judges.<sup>32</sup> In fact, the existence of rampant anti-Black and anti-indigenous sentiment in Latin America and the Caribbean social contexts, may very well lead its jurists to similarly unconsciously misperceive civil rights laws as not being real law.<sup>33</sup>

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Elements of Reform 1 (1996).

23. Christina Biebesheimer, *Justice Reform in Latin America and the Caribbean: The IDB Perspective*, in *Rule of Law in Latin America: The International Promotion of Judicial Reform* 99, 99 (Pilar Domingo & Rachel Sieder eds., 2001).

24. Linn A. Hammergren, *The Politics of Justice and Justice Reform in Latin America* 4 (1988).

25. *Id.* at 4.

26. Dakolias, *supra* note 22, at 25-26.

27. *Id.* at 17.

28. *Id.* at 36.

29. José Renato Nalini, *Judicial Reform in Brazil*, in *Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference* 172 (Malcom Rowat, et al. eds., 1995).

30. *Id.* at 174.

31. *Id.* at 172.

32. Hammergren, *supra* note 24, at 31 ("reform is unpredictable where an activist judiciary may not be a neutral arbiter, but rather another political actor").

33. See Tanya Katerí Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States - Latin*

Commentators note that social discrimination and class bias are still strong in the Latin American legal system.<sup>34</sup> Accordingly, in order for civil rights to be meaningful in Latin America, activist insecurity must be addressed within the larger context of judicial reform.<sup>35</sup> And yet the mechanism for addressing judicial activist insecurity may not be very different in Latin America than it is for the United States, given the centrality of unconscious racism in both contexts. Judicial training may offer one path.

### III. A CRITICAL RACE PRAXIS REMEDY TO ACTIVIST INSECURITY: JUDICIAL TRAINING

Because the text of civil rights laws is not able to mitigate the undermining influence of judicial activist insecurity,<sup>36</sup> perhaps the primary way to counteract its effects is by directly addressing it in the form of judicial training sessions. This approach would be in the spirit of a Critical Race Praxis approach to socio-legal problem solving. Critical Race Praxis is a strand of Critical Race Theory that examines the connection between theory and practical work aimed at transforming concrete social institutions.<sup>37</sup> Frequently, Critical Race Praxis “combines critical pragmatic analysis with political lawyering and community organizing to practice justice for racialized communities. It’s central idea is racial justice as antisubordination practice.”<sup>38</sup> But more importantly critical race praxis envisions racial justice practice as something more than the enforcement of civil rights laws.<sup>39</sup> Accordingly, one way to address the activist insecurity of judges is to directly address the issue within the context of judicial

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*America Comparison*, 87 Cornell L. Rev. 1093, 1125–26 (2002) (discussing the continued existence of racism in Latin America and the Caribbean).

34. Compare Brysk, *supra* note 17, at 258 (discussing the Ecuadorian legal system within the context of all of Latin America and stating “[s]ocial discrimination and class bias are still strong in the legal system as in society at large”).

35. The larger context of judicial reform must address the fact that historically “[c]onstitutional guarantees have often provided little or no protection in practice for weak and vulnerable groups,” and that “powerful elites tend to operate ‘above’ or ‘outside’ the law; impunity is widespread and powerful wrongdoers are rarely made accountable through legal means.” Rachel Sieder, *Conclusions: Promoting the Rule of Law in Latin America*, in *Rule of Law in Latin America: The International Promotion of Judicial Reform* 142, 151 (Pilar Domingo & Rachel Sieder eds., 2001).

36. White, *supra* note 7.

37. Critical Race Theory: The Cutting Edge 591 (Richard Delgado & Jean Stefancic, 2d ed. 2000).

38. Eric K. Yamamoto, *Interracial Justice: Conflict & Reconciliation in Post-Civil Rights America* 129 (1999).

39. *Id.* at 139.



training seminars. The inspiration for such a proposal stems from the legal revolution that is now occurring in post-apartheid South Africa.

The post-apartheid South African context is one in which judicial training has been utilized to transform apartheid racial and gender constructs. Social scientist Patrick Lynn Rivers has closely examined the South African context and he notes that with the benefit of legal scholarship from Critical Race Theorists in the United States, "[s]tate actors in South Africa who take account of the politics of racial constructs have done something that is largely undone in the United States: directly draw[n] upon and attempt[ed] to apply United States critical race theory in judicial practice."<sup>40</sup> In fact, the South Africa Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 mandates judicial training in its provisions in order to designate particular judges and magistrates as having the authority to run "equality courts" with particular expertise. But what is particularly noteworthy about the post-apartheid South African initiative is its training focus on spurring social transformation in and through law. The resources from which training curricula are formulated contain modules on the judicial necessity of considering social context and the existence of broad social and economic inequalities by race, along with the recognition that biases and stereotypes can operate in the process of judicial decision-making.<sup>41</sup>

While such progressive judicial training does not exist in the United States or Latin America, it is possible to infuse the current training options which exist for judges in the United States and Latin America, with deeper considerations of civil rights laws that directly address erroneous but often unconscious application of activist insecurity. Judicial training is not mandated for federal and state judges in the United States, but is often offered through a variety of institutions because judges have been perceived to be enthusiastic about their voluntary training sessions.<sup>42</sup> For instance, the Judicial Education Reference, Information, and Technical Transfer Project (JERITT) is a national clearinghouse for information on state, national, and federal-system judicial branch education options.<sup>43</sup> Since 1967, the Federal Judicial Center ("FJC") has offered judicial

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40. Patrick Lynn Rivers, *Judicial Training and Social Transformation in Post-apartheid South Africa* (unpublished paper presented at Law and Society Association 2003 Annual Meeting, June 8, 2003, Pittsburgh, PA) (on file with author).

41. *Id.* at 9-10.

42. Stuart Gorin & David Pitts, *Continuing Legal Education: Three Organizations That Fulfill the Need*, Issues of Democracy, Aug. 2002, at <http://usinfo.state.gov/journals/itdhr/0802/ijde/gorinpitts.htm> (last visited 9/23/03).

43. Michigan State University, Judicial Education Reference, Information and Technical Transfer Project (JERITT) at <http://jeritt.msu.edu> (last visited Sept. 23, 2003).

continuing education workshops at the federal level. The FJC is an independent education and research agency within the judicial branch of the United States government that receives government funding to conduct education and training programs for federal judges and court employees.<sup>44</sup> The FJC offers judicial training on such topics as recent developments in jurisdiction, evidence, sentencing, employment law, genetic research, and international litigation. Furthermore, the FJC has offered small group special-topic seminars on civil rights litigation.<sup>45</sup> A private organization that offers judicial training to state and federal judges alike, is the National Judicial College ("NJC"). The NJC was established in 1963 by the American Bar Association as a private, non-profit educational institution, offering a variety of courses to more than 2,000 judges and other court officials each year.<sup>46</sup> The NJC curriculum concentrates on the art and skill of judging and new trends in the law. At the state level, a variety of different institutions offer judicial training.<sup>47</sup>

In Latin America, much of the judicial training that exists is funded by a variety of international entities (bilateral aid agencies, the multilateral development banks, United Nations, Organization of American States and private foundations).<sup>48</sup> Consequently, the content of judicial training sessions is influenced by what such organizations are willing to fund. For instance, in the panoply of law reform funded projects it is rare to find any projects that support legal services for the poor or disadvantaged,<sup>49</sup> although funding is provided for training of judges.<sup>50</sup> The United States Agency for International Development has increasingly emphasized the training of judges and support of judicial schools in its funding of law reform projects in

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44. *Judicial Training Institutions*, Issues of Democracy, Dec. 1996, at <http://usinfo.state.gov/journals/itdhr/1296/ijde/njcpofit.htm> (last visited Sept. 23, 2003).

45. Stuart Gorin & David Pitts, *Continuing Legal Education: Three Organizations That Fulfill the Need*, Issues of Democracy, Aug. 2002, at <http://usinfo.state.gov/journals/itdhr/0802/ijde/gorinpitts.htm> (last visited Sept. 23, 2003).

46. *Id.*

47. See, e.g., History and Description of the Institute of Continuing Judicial Education of Georgia, at <http://www.uga.edu/icje/history.htm> (modified Feb. 21, 2002).

48. Thomas Carothers, *The Many Agendas of Rule of Law Reform in Latin America*, in *Rule of Law in Latin America: The International Promotion of Judicial Reform* 4 (Pilar Domingo & Rachel Sieder eds., 2001).

49. Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, in *The Rule of Law in Latin America: The International Promotion of Judicial Reform* 17, 27 (Pilar Domingo & Rachel Sieder eds., 2001). But the Inter-American Development Bank has begun to fund projects that focus on access to justice by disenfranchised citizens like minorities and the poor. See Biebesheimer, *supra* note 23, at 103

50. Biebesheimer, *supra* note 23, at 101.

Latin America.<sup>51</sup> Other institutionally funded law reform efforts often include training for judges.<sup>52</sup>

Yet, despite the funding constraint, it is encouraging to note that in those Latin American countries in which judges have been asked about the utility of training sessions, they have emphasized that such training encourages them to study more closely the problems with the legal system in their own countries.<sup>53</sup> In fact, the interest in law reform is rising in most Latin American countries,<sup>54</sup> and has recently become prominent in political discourse.<sup>55</sup> Furthermore, Non-Governmental Organizations agitating for judicial reform have frequently promoted the interests of ethnic minority groups,<sup>56</sup> and have been an integral part in strengthening the rule of law in the region.<sup>57</sup>

Thus, with the existence of various judicial training venues in the United States and Latin America, it is plausible to consider the possibility of adding a training component to address the issue of civil rights enforcement and the activist insecurity that impedes civil rights adjudication. While it is not the purpose of this essay to set out all the details of such a training workshop, a number of particular elements might be especially useful to consider. The training manual for trainers and participants should begin by including excerpts from John White's article describing activist insecurity and how it interferes with an appropriate adjudication of civil rights laws.<sup>58</sup> The manual should also include excerpts from Charles Lawrence's seminal article about the manifestation of unconscious racism in legal actors,<sup>59</sup> and Kimberlé Crenshaw's article about the importance of an expansive view of civil rights.<sup>60</sup> What the combination of such excerpts would provide is the exposure of the phenomenon of activist insecurity along with a framework of unconscious racism for understanding why it occurs, and an ideological perspective of

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51. Margaret J. Sarles, *USAID's Support of Justice Reform in Latin America, in Rule of Law in Latin America: The International Promotion of Judicial Reform* 47, 52, 54 (Pilar Domingo & Rachel Sieder eds., 2001).

52. Maria Dakolias, *Legal and Judicial Reform: The Role of Civil Society in the Reform Process, in Rule of Law in Latin America: The International Promotion of Judicial Reform* 80, 81 (Pilar Domingo & Rachel Sieder eds., 2001).

53. Rogelio Perez Perdomo, *Training Programs for Judges, in Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference* 108, 111 (Malcolm Rowat et al. eds. 1995) (discussing anecdotal evidence from judges in El Salvador and Venezuela).

54. Carothers, *supra* note 48, at 4.

55. Sieder, *supra* note 35, at 154.

56. *Id.* at 85.

57. *Id.* at 96.

58. White, *supra* note 7, at 826.

59. Lawrence, *supra* note 10.

60. Crenshaw, *supra* note 16, at 1341.

expansive civil rights for addressing activist insecurity. The expansive civil rights perspective delineated by Kimberlé Crenshaw

stresses equality as a result, and looks to real consequences for African-Americans [and other subordinated populations]. It interprets the objective of antidiscrimination law as the eradication of the substantive conditions of Black [and other] subordination and attempts to enlist the institutional power of the courts to further the national goal of eradicating the effects of racial oppression.

Within the presentation of the expansive view of civil rights, a discussion of Owen Fiss' antistatutory approach to the Equal Protection Clause<sup>61</sup> could also be made, because of the pervasive use of this same equality principle in most Latin American constitutions.<sup>62</sup> The antistatutory principle views the Equal Protection Clause as prohibiting a law or official practice that aggravates the subordinate position of a specially disadvantaged group. The antistatutory principle stands in contrast to the more restrictive formality approach that understands equal protection to be satisfied with simplistic equal treatment. With the examination of the expansive view of civil right laws, the training manual would then be primed to introduce the few examples that currently exist of judges who have utilized Critical Race Theory in the adjudication of their cases to advance an expansive and antistatutory view of civil rights.<sup>63</sup> Suggestions for how to employ an expansive view of civil rights might also be distilled from Christopher Bracey's recent comparison of antistatutory-style adjudication with free jazz.<sup>64</sup> As Bracey describes it,

free jazz is a useful metaphor in terms of developing a style or approach to adjudication that attempts to realize democracy for subordinated groups. When confronted with a case that demands vindication of the rights and interests of subordinated groups in the face of majority rule, judges, like their jazz counterparts, should place freedom (disciplined by the antistatutory principle) at the center of the adjudicative enterprise, and approach the task of judging with creativity, commitment, and courage. In cases where the

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61. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Phil. & Pub. Aff. 107, 157 (1976).

62. See Hernández, *supra* note 33, at 1128 n.205 (listing the equality provisions of many Latin American and Caribbean countries).

63. See Delgado & Stefancic, *supra* note 8, at 109–119 (describing the few cases in which judges have used Critical Race Theory to adjudicate a case).

64. Christopher A. Bracey, *Adjudication, Antistatutory, and the Jazz Connection*, 54 Ala. L. Rev. 853 (2003).

rights and interests of members of socially disfavored groups are in jeopardy, judges *should not reflexively indulge the status quo or the path of least resistance*, but act affirmatively and forthrightly in a manner consistent with the best of the American constitutional, democratic, and free jazz tradition.<sup>65</sup>

#### CONCLUSION:

In short, I propose a Critical Race Theory-infused judicial training manual and workshop that exposes the existence of the activist insecurity and openly discusses the concepts of unconscious racism along with the need for an expansive view of civil rights law to prevent the actual demise of civil rights laws that John White discusses. Admittedly a single judicial training session cannot possibly remedy all the ills of activist insecurity. What is proposed here is a humble contribution towards practically applying the potent revelations of Critical Race Theory for judicial reform, in the hopes of spurring on many more Critical Race Theory-related legal reforms in the United States and in other regions like Latin America that have parallel histories of racial hierarchy and the continued presence unconscious racism influencing the conduct of legal actors.

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65. *Id.* at 875–76 (emphasis added).